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No. 92-789

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ATLANTIC RICHFIELD COMPANY,
Petitioner,

v.

UNITED STATES DEPARTMENT OF ENERGY, *et al.*,
Respondent,

and

DON VAN VRANKEN on behalf of himself and all others similarly situated,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

REPLY BRIEF FOR THE PETITIONER

Of Counsel:
RICHARD C. MORSE
ATLANTIC RICHFIELD COMPANY
1055 West Seventh Street
Los Angeles, CA 90071

DAVID L. ROLL
(Counsel of Record)
SHELDON E. HOCHBERG
RICHARD K. WILLARD
ALFRED M. MAMLET
PANTELIS MICHALOPOULOS
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
Attorneys for Petitioner

February 8, 1993

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONER

ARCO seeks review of the lower court's decision that the prohibition against selective prospectivity announced in *Beam*[1] is inapplicable to judicial invalidations of federal regulations. The most notable feature of federal respondents' Brief is that they do not even attempt to defend this decision. Instead, the federal respondents advance an argument not previously raised or considered in any prior proceeding.

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[1] *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991).

I. THE DECISION PROHIBITING ARCO FROM BENEFITTING FROM THE NEW RULE OF LAW WAS A SUBSTANTIVE DETERMINATION

Federal respondents' principal argument is that *Beam* does not permit ARCO to benefit from the new rule in *Mobil*.[2] They assert that the DOE's requirement to show "good cause" for refiling the cost allocations "operate[s] in the nature of a statute of limitations" and is "precisely the sort of 'procedural requiremen[t]' that *Beam* expressly recognized as a potential bar to recovery by a litigant in this case." Fed. Resp. Br. 10. The argument that ARCO was somehow time-barred from making the refiling is not only squarely refuted by the regulation, but was explicitly rejected by the Office of Hearings and Appeals ("OHA").

The DOE regulation clearly provides that acceptance of ARCO's refiling does not turn on a filing deadline but on a requirement to show "good cause." If the regulation actually barred refiners from refiling cost allocation reports after June 1, 1979, then ARCO's refiling petition would indeed have been time-barred, and the "new rule [could] not reopen the door already closed." *Beam*, 111 S. Ct. at 2446. However, the regulation explicitly provides that a refiner may refile the reports after June 1, 1979 "for good cause shown." Pet. Br. App. 30a. Thus, DOE's regulation leaves the door open for ARCO to take advantage of the new rule of law.

Federal respondents' argument is even more remarkable because OHA specifically rejected DOE's contention that ARCO's refiling petition was time-barred under the doctrine of laches. Pet. Br. App. 42a-45a. Laches, not the good cause requirement, is one of the "procedural

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[2] *Mobil Oil Corp. v. DOE*, 610 F.2d 796, 802, 804 (Temp. Emer. Ct. App. 1979), *cert. denied*, 446 U.S. 937 (1980) ("*Mobil I*"); *Mobil Oil Corp. v. DOE*, 647 F.2d 142, 145 (Temp. Emer. Ct. App. 1981) ("*Mobil II*"); *Mobil Oil Corp. v. DOE*, 678 F.2d 1083, 1090 (Temp. Emer. Ct. App. 1982) ("*Mobil III*").

barriers such as statutes of limitations" that *Beam* expressly recognized as a potential bar to recovery. 111 S. Ct. at 2443. Given OHA's determination that there was no time bar to ARCO's refiling petition, federal respondents should not now be heard to claim that ARCO's petition was untimely.[3]

After deciding that ARCO's petition was timely, OHA rejected ARCO's petition for substantive reasons. OHA decided that the new rule in *Mobil* did not constitute "good cause" for the refiling because ARCO should not be permitted to ride "Mobil's coattails." Pet. Br. App. 51a. This decision is just as "substantive" as the decision of the Georgia Supreme Court not to allow Beam to ride Bacchus's[4] coattails. *Beam* makes clear, however, that persons who seek to have a new rule applied to them even though they did not join in or bring a replicative suit "cannot be characterized as freeloaders [or coattail riders] any more than those who seek vindication under a new rule on facts arising after the rule's announcement."[5]

II. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE SPLIT AMONG THE COURTS OF APPEALS

Federal respondents try to brush aside the square conflict between the decision below and the Eighth Circuit's decision in *Goodner*.[6] They attempt to distinguish *Goodner* from this case by claiming that "there was nothing illegal or improper about petitioner's cost allocations" which re-

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[3] Federal respondents are also simply wrong to contend that the court below found that ARCO did not meet the "due care and diligence" standard. Fed. Resp. Br. 11. In fact, the decision below did not even mention this issue.

[4] *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

[5] *Beam*, 111 S. Ct. at 2447.

[6] *United States v. Goodner Bros. Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992), *cert. denied on other issues*, 61 U.S.L.W. 3477 (U.S. Jan. 12, 1993) (No. 92-607).

sulted in lower prices charged to consumers than would be permissible under the new rule. Fed. Resp. Br. 9 n.1. This distinction would nullify *Beam* itself. There similarly was "nothing illegal or improper about" Beam paying more liquor tax than was required under the new rule. However, this Court clearly held that the prohibition against selective prospectivity permitted Beam to benefit from the new rule in *Bacchus*. *Beam*, 111 S. Ct. at 2447. Thus, the issue is not whether ARCO's conduct was legal.

Rather, the issue in both *Goodner* and this case is whether *Beam* permits absent litigants to have the benefit of judicial decisions invalidating agency regulations. Since the Eighth Circuit held that the prohibition against selective prospectivity applies to judicial invalidations of federal regulations and the court below reached the opposite conclusion, the conflict between the courts of appeal is clear.

III. THE UNCERTAINTY CREATED BY THE DECISION BELOW AFFECTS REGULATED ENTITIES, FEDERAL COURTS AND FEDERAL AGENCIES

Attempting to minimize the impact of the holding below that the prohibition against selective prospectivity does not apply to federal court decisions invalidating regulations of a federal agency, the federal respondents quote a passage out of context from an ARCO brief written before the court below issued its decision. Fed. Resp. Br. 11-12. While it is true that the *relief* sought by ARCO would not adversely affect consumers or any DOE programs, the *significance of the decision below* is much broader.

Uncertainty over whether judicial decisions invalidating federal agency regulations will apply to similarly situated absent parties will affect regulated companies and individuals, federal courts and federal agencies. Each time a federal regulation is challenged in court,

regulated entities can ensure that any decision invalidating the regulation will apply to them only by filing the very "replicative suits" *Beam* was intended to prevent. *Beam*, 111 S. Ct. at 2447. In addition, federal courts will not know whether to apply the new rule or the old rule. Finally, federal agencies will not know if they are bound to apply new rules of law invalidating their regulations to absent parties. Pet. Br. 11-14.

CONCLUSION

For the foregoing reasons and the reasons set forth in ARCO's petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Of Counsel:
RICHARD C. MORSE
ATLANTIC RICHFIELD COMPANY
1055 West Seventh Street
Los Angeles, CA 90071

DAVID L. ROLL
(Counsel of Record)
SHELDON E. HOCHBERG
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